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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FLORIDA ECONOMIC ADVISORY COUNCIL, *Petitioner*

v.

FEDERAL POWER COMMISSION, et al., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION AND FLORIDA DEVELOPMENT COMMISSION IN OPPOSITION

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These parties adopt the Federal Power Commission's Brief in Opposition. They wish, however, to elaborate briefly upon that Respondent's Statement of the Case and Argument in order to present matters peculiarly relating to their interest.

STATEMENT OF THE CASE

The Florida Economic Advisory Council is not an official body and does not represent in any way whatsoever the State of Florida. It is a private organization, the membership of which consists of a portion of those engaged in the marketing and transporting of

[redacted]

official agencies of the State of Florida, both duly created and existing pursuant to Statute, Chapter 350 and Chapter 288, Florida Statutes, respectively. Both commissions are charged with the promotion and protection of the public interest.

The petitioners, all doing duties the two commissions, and certain participated in the proceedings before the Florida Public Service Commission (hereinafter referred to as "the Commission") in support of [illegible] for certification for construction of the [illegible] and generating facilities. In the Court of Appeals, [illegible] in support of the Commission's [illegible] they now request before this Court to urge [illegible] petitioner's request for a writ of certiorari be

[illegible] Florida is one of the very few large [illegible] States not now supplied with natural [illegible] is the only state with practically no [illegible] of power [illegible] [illegible] [illegible]

petroleum products in Florida. One of its announced purposes is to resist introduction of natural gas into Florida (R. 3485, 7875).

The Court below summarized Petitioner's sole aggrievement when it stated:

> "While petitioner's business will no doubt be affected by the advent of natural gas, both petitioner and the pipe line companies can do business in Florida and both are needed to serve the growing population and expanding economy of Florida. *The 'injury' to petitioner is that it must share what has heretofore amounted to a power monopoly.* Moreover, the injury to petitioner is not likely to be substantial. As petitioner's brief says, 'as against the overall fuel needs of the State of Florida, the volume of gas brought in would be meager.'" (Emphasis supplied) (Pet. App. 10a)

The Florida Railroad and Public Utilities Commission[1] and the Florida Development Commission[2] are

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[1] Florida Railroad and Public Utilities Commission has intrastate jurisdiction to regulate and supervise electric and gas plants with respect to rates, service, and the issuance and the sale of securities. The gas companies under the jurisdiction of the Florida Railroad Commission presently serve approximately 150,000 customers with manufactured gas and the electric companies serve approximately 700,000 customers (R. 2693-2701).

[2] Florida Development Commission is an agency of the State of Florida, charged with the responsibility of promoting the coordinated, efficient and beneficial development of the State and its natural resources. It is authorized to promote, foster and encourage the development of Florida industries. Its particular interest in the proceeding before Respondent Commission was and is to assist the people and the industries of Florida in obtaining a second fuel and to reduce the disadvantages with respect to fuel and energy under which the people and the industries of Florida are now placed because of their dependence on a single source of fuel (R. 2765-2766).

official agencies of the State of Florida, both duly created and existing pursuant to Statute, Chapter 350 and Chapter 288, Florida Statutes, respectively. Both commissions are charged with the promotion and protection of the public interest.

In the performance of these duties the two commissions intervened and actively participated in the proceedings before the Federal Power Commission (hereinafter referred to as "Commission") in support of Houston's and Coastal's applications for certificates of public convenience and necessity. In the Court of Appeals they appeared in support of the Commission's orders. They now appear before this Court to urge that Petitioner's request for a writ of certiorari be denied.

Peninsular Florida is one of the very few large areas of the United States not now supplied with natural gas. Florida is the only state with practically no native usable energy supply, being 99 percent dependent upon imported energy which consists primarily of petroleum products imported by tanker and barge (R. 2766). The public interest of Florida overwhelmingly demands the introduction of natural gas to meet the needs of the state's ever growing population and to develop fully its industrial potential as well as to secure for Florida the economic advantages already possessed by other neighboring states R. 1417-1432; 2765-2772.[3] The total dollar saving from the use of

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[3] The Commission's Opinion 301 stated as follows:

"The record establishes the existence in Florida both of a desire and need for natural gas, and of the existence of markets ready and waiting for all the volumes of gas applicants propose to transport and to sell under their plan of operation. The public demand and need for gas were attested to by

natural gas by Florida customers will be $14,566,000 in the first year of operation and $18,403,000 in the third year of operation (R. 7110-7111).

Two weeks before the hearings closed Houston and Coastal moved that the intermediate decision procedure be omitted and the Commission itself decide the case directly since all of Coastal's gas supply contracts contained provisions for cancellation or automatic cancellation if Coastal had not received a certificate of public convenience and necessity from the Commission on or before December 31, 1956. The Commission granted the motion.[4]

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numerous state and city officials as well as representatives of consumer interests and others. * * *

"The public need for gas in Florida and the corresponding benefits of gas service to consumers in that state derive from a number of circumstances. We have already mentioned some of the market factors which favor the introduction of natural gas to Florida. It is obviously at a disadvantage, both competitively and otherwise, by its dependence upon petroleum products, a single source of fuel. For example, during World War II, the heating and industrial fuel supply, as well as the electrical and petroleum gas supply of the state, were critically threatened by the tanker sinkings and the enlarged military oil needs of that time. The introduction of natural gas, in addition to making available to consumers in Florida the usual benefits of natural gas of cleanliness, convenience and economy, would provide a second source of fuel to help forestall any possible emergency shortage, would give rise to greater fuel competition in the state with its attendant public advantages, would aid in the economic development of the state by stimulating industry and otherwise, and would help meet the growing fuel demands of the burgeoning Florida population." (Pet. App. 30-31a).

[4] The Commission's order omitting the intermediate decision procedure stated as follows:

"The record reveals that the gas purchase contracts are subject to cancellation on the grounds asserted by Houston

On December 28, 1956, the Commission issued its Opinion 301 and accompanying order granting the certificates of public convenience and necessity. The Commission imposed certain conditions for the principal purpose of stabilizing revenues and eliminating preferences in the proposed rates (Pet. App. 48a).

Petitioner then sought review of the Commission's action in the Court below. In that forum it argued the four issues on which it seeks review in this Court. The Court below specifically decided each of these four issues adversely to Petitioner (Pet. App. 5-10a).

ARGUMENT

The issues raised by Petitioner in this Court are no more than an attempt to obtain another review of the case on its facts. Each point presented to this Court was also presented to the Court below and decided adversely to Petitioner.

I. Omission of Intermediate Decision Procedure and Prompt Decision Were Proper

Petitioner's claim that the Commission erroneously omitted the intermediate decision procedure presents no question of sufficient general importance to war-

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and Coastal. *Of paramount interest, however, is the interest of the public in Florida* as represented by officials of the State of Florida, the Florida Railroad and Public Utilities Commission, the Orlando Utilities Commission, and many municipalities interested in natural gas for the State of Florida." (Emphasis supplied.) (R. 20337.)

* * *

"(2) Upon the basis of the entire record, due and timely execution of its functions imperatively and unavoidably requires that the Commission omit the intermediate decision procedure and render final decision in the proceeding." (R. 20338).

rant review by this Court. This case does not in any sense require this Court to construe the applicable portion of the Administrative Procedure Act. Basically, Petitioner's argument is that the Commission did not correctly evaluate the evidence as to whether or not the intermediate decision procedure should be omitted. This is not a sufficient basis for the granting of a writ of certiorari.

The Commission has the power in initial certificate cases to omit the intermediate decision procedure "when [it] finds upon the record that due and timely execution of its functions imperatively and unavoidably so require." Administrative Procedure Act, 5 U.S.C. 1007(a). The Commission made such a finding upon the record (R. 20338). This ultimate finding was based, in part, upon the following facts: (1) Contracts comprising about one third of the proposed projects' total gas supply contained automatic cancellation clauses if certificates were not granted by December 31, 1956 (R. 9266-7, 9270, 9249, 12236); (2) the other gas supply contracts were subject to cancellation if the certificates were not issued by that date and there was no evidence in the record that they would not be cancelled (R. 9696, 9695); (3) on November 15, 1956, just one day after the motion for the omission of the intermediate decision procedure (in another Federal Power Commission proceeding), similar cancellation options in gas supply contracts were exercised. (F.P.C. order of June 11, 1957 in Dockets G-10396 et al; Pet. Brief, p. 17); (4) a new gas supply for the Florida markets could not be assembled at the same prices (R. 6562); and (5) the tremendous need for natural gas in Florida (R. 2696-2701; 2765-2772; 1417-1432)

In upholding the Commission's action the Court below found that "[t]here was substantial evidence to support this finding that the Commission's execution of its function imperatively and unavoidably required the omission of the intermediate decision procedure" (Pet. App. 7a). The Court of Appeals' decision was not only in accord with the facts but was also in accord with a long line of decisions, *Alabama-Tennessee Natural Gas Co. v. Federal Power Commission*, 359 F. 2d 318 (C.A. 5th 1966); *Colorado Interstate Gas Co. v. Federal Power Commission*, 209 F. 2d 717 (C.A. 10th 1954); *RCA Communications, Inc. v. Federal Communications Commission*, 253 F. 2d 24 (C.A. D.C. 1956); *Kenney v. United States*, 103 F. Supp. 971 (D.C. N.J. 1952). This issue certainly presents no matter which needs review by this Court.

Having decided that the public interest in obtaining natural gas for Florida far outweighed other factors, it was only logical and proper that the Commission should act promptly in rendering its decision. The fact that the Commission acted with dispatch does not mean that this was an ill considered case.[5]

Petitioner's argument on this issue ignores—or refuses to recognize—that more than three-fourths of the record, comprising proof of gas supply and markets, was uncontroverted. An analysis of Opinion 301 shows that all important details were considered by the

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[5] See in this connection the Commission's comment: "Thus in this case we encounter the novel situation of parties complaining not of administrative delay but of administrative dispatch. However, we find the complaints unjustified, if unusual." (Emphasis supplied.) (R. 2260?)

Commission.* Administrative dispatch in rendering a decision supported by substantial evidence which surrounded the agency's decision constitutes an important factor [illegible] for review on certiorari. [illegible] court's decision. [illegible] [illegible] [illegible] *Standard Oil Co. of Calif.*, [illegible] (S.D. Cal. 1937).

II. Grant of Certificates With Conditions Attached Was Proper

Petitioner seeks review of the decision below [illegible] basis that the Court erred in upholding the Commission's action in issuing certificates of public convenience and necessity with conditions attached without

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*The Court below found:

> "We do not find this to show a time, considering the need for dispatch, as to amount to a denial of substantial rights. There is no showing that due to the speed, petitioner overlooked any important points or was otherwise adversely affected."
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> * * * * * *
>
> "It is not for the courts, short of flagrant extremes, to tell the administrative agencies how long they must ponder before coming to a decision. The time spent in considering the evidence cannot be held by us to be too little if it appears that the Commission has spent the time required to satisfy itself as to its findings and conclusions. We cannot say that either the statute or the Constitution was violated by the Commission in not considering a longer time in considering and deciding the case. The vigorous dissent by the Commissioners Connole and Kline serves to emphasize the close scrutiny given by the Commission." (Pet. App. 8-9a.)

[redacted] Petitioners' contention that the Commission's order is void because it was issued without a hearing is without merit. [redacted] Section 7(e) of the Natural Gas Act [redacted] specifically provides that certificates may be issued "after due notice and opportunity for hearing." 15 U.S.C. 717f(e). [redacted] Commission's power to abbreviate procedure has been repeatedly upheld by the Courts. *See, e.g., Sigmor Oil and Gas Co. v. Federal Power Commission*, 208 F. 2d 707 (C.A. 10th), cert. denied, 347 U.S. 928; *Interstate Power Co. v. Federal Power Commission*, 206 F. 2d 37, (C.A. [redacted]), cert. denied 347 U.S. 967; and see also *[redacted] Board v. Slick Airways, Inc.*, 338 U.S. [redacted]. In view of Congress' clear language in the statute [redacted] not giving Respondent power to [redacted] conditions, which power has been consistently upheld by the Courts, there is no sound basis for the granting of a writ of certiorari.

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[1] The Court below found:

"The conditions only received minor mixed, signed and briefed in the hearing. They involved no surprise except insofar as they may have gone further or not so far as petitioner would have wished." (Pet. App. 8a).



[illegible]

[illegible]

[illegible]

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BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

Opinion No. 301 of the Federal Power Commission (R. 425-475; Pet. App. 21a-68a) is reported at 16 F.P.C. 118. The opinion of the Court of Appeals (Pet. App. 1a-20a) is reported at 251 F. 2d 643.

JURISDICTION

The judgments of the Court of Appeals were entered on December 4, 1957 (Pet. App. 1a). Petitions for rehearing and for rehearing *en banc*, timely filed, were denied on January 9, 1958. The petition for a writ of certiorari was filed on April 9, 1958. The jurisdiction

of this Court is invoked under 28 U.S.C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U.S.C. 717r (b).

QUESTIONS PRESENTED

1. Whether the court below correctly upheld, as supported by substantial evidence, findings of the Federal Power Commission establishing that a petroleum fuel trade association, which had been permitted to intervene and contest Commission authorization of competitive natural gas services in areas served by its members, received a fair and lawful hearing on objections to the proposed pipe line.

2. Whether the Federal Power Commission, before issuing a natural gas certificate of public convenience and necessity, is required not only to give consideration to the public policies embodied in the antitrust laws, but also to make definitive findings on whether a proposed service would violate the anti-monopoly or unfair trade practice statutes.

STATUTE INVOLVED

The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, provides in pertinent part as follows:

> Sec. 7(c). No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience

and necessity issued by the Commission authorizing such acts or operations: * * *.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: * * *.

* * * * * *

Sec. 7(e). Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

STATEMENT

The petition in this case seeks review of a decision of the Court of Appeals for the District of Columbia Circuit which affirmed orders of the Federal Power Com-

mission issuing certificates of public convenience and necessity for a natural gas pipe line from Texas to points within the state of Florida.

1. *Background.* Petitioner is an association of carriers and distributors of fuel oil and allied interests which was organized in part for the purpose of resisting the introduction of competitive supplies of natural gas into the Florida market (Tr. 7875, R. 393, Pet. App. 2a, fn. 2). The certificate applications here involved were filed by two natural gas pipe line companies, Houston Texas Gas and Oil Corporation and Coastal Transmission Corporation (hereafter referred to as the applicants), in August 1955 and February 1956 (R. 426). The applications sought authorization to construct 1500 miles of natural gas pipe line and related facilities from Hidalgo County, Texas, to Dade County, Florida, each applicant constructing and operating a section of the line.[1] The total cost of the line and facilities, which would initially provide gas transportation capacity of 250,000 Mcf of gas per day, was estimated at approximately $150,000,000 (R. 428). The applications contemplated that gas utilizing 100,000 Mcf per day of the estimated capacity would be purchased initially by Coastal and transported and sold (on a cost of service basis) to Houston Gas, at the juncture of the two lines, for further transport and resale by Houston Gas in the Florida market. The remaining line capacity, 150,000 Mcf per day, would

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[1] Separate but related applications were filed: Coastal's provided for a pipeline running from Hidalgo County, Texas to a point east of the Mississippi River; Houston Gas' application covered a pipe line from that point to Dade County, Florida (R. 427-428). The applications were consolidated for hearing by the Commission (R. 397).

be utilized by gas purchased in the field by two Florida power companies and transported to Florida by Houston Gas under contract with the purchasers, Houston Gas compensating Coastal for its part in rendering the transportation service (R. 429).

2. *Proceedings before the Commission.* Extensive hearings on the applications were held by the Commission, beginning in July 1956. Petitioner intervened and participated actively (Pet. 5), challenging the validity of the applications on a variety of grounds (R. 394). On November 14, 1956, shortly before the conclusion of the hearing, the applicants moved that the Commission's intermediate decision procedure be omitted pursuant to Section 1.30 (c) of the Commission's Rules of Practice (18 CFR 1.30 (c)), and that the record be transmitted directly to the Commission for decision at the conclusion of the hearing (R. 410). At the end of the hearing before the trial examiner, the Commission, over the objections of petitioner and certain other interveners, granted the motion and set the matter for argument (R. 421). The Commission found, pursuant to Section 8 of the Administrative Procedure Act (Pet. App. 96a), that "due and timely execution of its functions imperatively and unavoidably requires that the Commission omit the intermediate decision procedure," inasmuch as "the record shows that unless final action is taken by the Commission prior to December 31, 1956, the gas purchase contracts of Coastal will be subject to cancellation * * *." (R. 412-413).[2]

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[2] The Commission ordered opposing interveners, including petitioner, to file briefs by December 15, 1956, and set the matter for argument on December 21, 1956 (R. 412, 422). The Commis-

Petitioner, in its brief to the Commission and on oral argument, attacked the proposed project on the grounds, *inter alia*, (1) that the contractual arrangements governing the sale and transportation of the gas purchased directly by the Florida power companies would defeat the Commission's rate-review jurisdiction, and were contrary to the intent of the Natural Gas Act, and (2) that the rate structure proposed by the applicants provided uneconomic rates for the transportation of the direct-sale gas and discriminated against ultimate consumers in favor of the direct sale power company purchasers (Br. for Intervenor, Florida Economic Advisory Council, Dockets Nos. G-9262, 9960, pp. 6-33.)[2]

On December 28, 1956, the Commission, two Commissioners dissenting, issued its Opinion No. 301 (R. 425-475; Pet. App. 21a-68a) in which it granted certificates of public convenience and necessity authorizing the project proposed by the applicants, subject to compliance by the applicants with certain rate and finance conditions. These conditions, which were responsive to objections to the proposed project raised by petitioner, the Commission staff, and other interveners, required that both Houston Gas and Coastal file revised rate schedules, tariffs, and related materials to provide, in summary, that (R. 462-464):

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sion's order emphasized that "it must be understood that the Commission in granting this motion is giving primary consideration to the public interest and not adopting a policy of permitting Applicants to fix and assert date deadlines * * *." (R. 412).

[2] Petitioner also challenged the economic feasibility of the project, and claimed that it would injure the Florida economy (*Id.* at 3-8).

(1) rates for the transportation service and the gas supply services rendered by the applicants would be based on cost of service (including return on investment at not more than 6%) allocated on the basis of existing Commission practice, thereby eliminating the discriminatory and uneconomic rate structure challenged by petitioner;

(2) existing cancellation clauses in the applicants' supply contracts be eliminated so as to preserve Commission jurisdiction to protect consumers against loss of the gas supply;

(3) project financing should be based on a proportion of at least 15% of equity and not over 15% debt, in accordance with a plan to be approved in advance by the Commission.[4]

In January 1957, Houston Gas filed tariffs and materials stating that it had substantially complied with the conditions imposed in the certificates. It also requested a rehearing to obtain relief from certain minor conditions which it stated were no longer necessary or undesirable, or were of a *de minimis* character (R. 495-503). A rehearing was also requested by petitioner, reiterating its earlier contentions as to the lack of economic feasibility or need for the project and attacking the procedure employed by the Commission in granting certificates subject to conditions. Petitioner did not, however, challenge the substance of the condi-

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[4] The order also imposed several additional conditions: (1) providing a method of computing minimum bills on resales to municipalities and other purchasers; (2) requiring working capital offsets for tax accruals in the cost-of-service formula rate Coastal would charge Houston Gas; and (3) eliminating certain objectionable contract adjustment provisions. (R. 462-464).

tions which were largely responsive to petitioner's earlier objections (R. 533-549).[5]

The Commission on February 21, 1957, in an order joined in by the entire Commission without dissent,[6] accepted for filing modified rate tariffs and other materials, submitted by the applicants in substantial compliance with the conditions required in the Commission's earlier opinion (No. 301), and denied all of the applications for rehearing (R. 555-576). The Commission found that the applicants' filings and materials substantially met the requirements of its earlier order; rejected the applicants' request for relief from certain of the conditions but extended the time for compliance with them; and granted the applicants' request that one of the conditions be modified to meet particular circumstances and that another be waived as *de minimis* (R. 560-561, 570-574).[7]

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[5] After Houston Gas had filed its application for rehearing, petitioner sought to file an "answer" (R. 588-594) which was rejected by the Commission Secretary as not provided for by the Gas Act or the Commission's rules (R. 550). The Secretary's action was subsequently sustained by the Commission. (R. 570-571).

[6] Commissioner Connole stated, in concurring separately, that his original dissent from Opinion No. 301 had been based on objections which had been satisfied by revisions which had since been made. (R. 574-576).

[7] The condition relating to a minimum billing demand was revised by the Commission to take into account the low load factor which is peculiar to the Florida market (R. 561). The other condition waived by the Commission as *de minimis* related to the elimination of cancellation clauses in contracts for one class of service constituting only 3.4% of the applicants' business (R. 561), after the purpose of the condition had been accomplished by elimination of such clauses from contracts for all other classes of service.

The Commission's order also imposed five additional conditions

3. *Proceedings in the Court of Appeals.* The petition for review (No. 13833) in the Court of Appeals for the District of Columbia Circuit followed.[8] Petitioner's contentions before the Court of Appeals are summarized in the opinion below (Pet. App. 4a) as follows:

> Its claims fall into two categories, substantive and procedural. Substantively, it claims the Commission's decision should be reversed (1) because not based on substantial evidence; (2) because there was no power to attach curative conditions to a defective proposal; and (3) because certain key issues were raised before but not decided by the Commission. Procedurally, petitioner claims it was denied a fair hearing in that (1) the intermediate decision by a hearing examiner was omitted; (2) the whole proceedings after the hearings were completed were infected by undue haste; and (3) petitioner should have been heard when the conditions were imposed on the pipeline companies, and later when they were relaxed. * * *

The court upheld the Commission's orders on all grounds (Pet. App. 1a-10a). The court rejected petitioner's substantive attack against the certificates,

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or requirements on the applicants designed to protect the general public. It required clarification of certain provisions in the rate schedules, elimination of automatic rate adjustments and cancellation provisions, and adjustment of billing demands as between transportation and gas sales service to conform to usual Commission practice. (R. 558-559, 563-564). Petitioner makes no complaint as to this part of the Commission's order.

[8] Petitioner filed a second application for rehearing of the Commission's order (R. 584) which was rejected by the Commission (R. 598) on April 18, 1957. A second petition was filed by petitioner to review this order (No. 13952) (R. 579). The two petitions were consolidated for hearing by the court below (Pet. App. 1a).

finding that "public convenience and necessity are self-evident" (Pet. App. 4a-6a), and held that the Commission's refusal to pass upon issues not immediately involved in the project was justified as a matter of law (Pet. App. 6a-7a).

The court also held that the Commission was fully justified in omitting the intermediate decision procedure and in expediting the proceeding. It ruled that petitioner had received a fair hearing on the issues involved in the conditions imposed by the Commission, inasmuch as the "conditions only resolved issues raised, argued and briefed in the hearing" (Pet. App. 7a-10a). Judge Bazelon dissented as to the procedural points, finding it unnecessary to consider the questions of legality or feasibility of the project (Pet. App. 11a-20a).

ARGUMENT

Petitioner attacks the validity of procedures employed by the Federal Power Commission in authorizing the construction of a new natural gas pipe line. In this attack, petitioner relies, as it must, upon an entirely different view of the underlying facts from that taken by the Commission, initially, and by the court below. The correctness of petitioner's contentions, therefore, depends upon whether its own analysis of those facts is to be preferred to that of the Commission and the Court of Appeals.

We believe that the court below was correct in upholding the Commission's findings that petitioner received a fair hearing, and in sustaining the procedures underlying those findings. Furthermore, there can be no question that the Commission's action was in every respect subjected to judicial scrutiny by the the Court of Appeals and found to be supported by the record.

We perceive no necessity for this Court to make an additional scrutiny of that record, and since petitioner's other contentions plainly lack substance, there is no occasion for further review of the case.

1. Petitioner challenges the Commission's action in omitting the intermediate decision procedure and in expediting its decision in order to prevent possible failure of a natural gas project (found to be in the public interest) as a result of cancellation of gas supply contracts prior to a decision (Pet. 13-23).

(a) Petitioner argues that the Commission could not omit the intermediate decision procedure under Section 8 of the Administrative Procedure Act merely because of a "naked possibility" that the supply contracts might be cancelled (Pet. 16-18). The court below held, however, that there was substantial evidence to support the Commission's findings that the danger of cancellation was real and that a need for expedition existed; in these circumstances, the court ruled that omission of the intermediate decision was not an abuse of discretion. (Pet. App. 7a-8a; fn. 17).[9] One of the Commission's primary functions, of course, is to authorize the development of adequate gas supplies and construction of facilities and services to meet consumer needs. It, therefore, must be entitled, in the exercise of its sound discretion, to dispense with the inter-

[9] Five of the supply contracts with Superior Oil Company, providing for almost one third of the entire gas reserves dedicated to the performance of the project (Tr. 9266-7, 9270, 9249, 12238), contained automatic cancellation clauses effective without further action by the parties if a certificate had not been issued by December 31, 1956 (Tr. 8976, 9027, 9079, 9131, 9183). The loss of these reserves alone would probably have been fatal to the project.

mediate decision procedure when, as here, it has substantial grounds for concluding that otherwise the whole project before it might become moot without consideration having been given to its merits. See *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 209 F. 2d 717, 722 (C.A. 10), reversed on other grounds, 348 U.S. 492; *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 203 F. 2d 494, 497-498 (C.A. 3).[10]

b. Petitioner further complains (Pet. 19-23), relying on *Morgan* v. *United States*, 298 U.S. 468, that it was denied a fair hearing because, it asserts, the Commission could not have read the entire record of over 20,000 pages between the time the record was certified to the Commission, immediately following November 28, and the decision one month later, on December 28, 1956. Even if this supposition were true, the Commission's order would not thereby be invalidated.

The Commission rejected the same argument in its order denying rehearing, stating that it gave the case "consideration as full and careful as it would if dealt with on a routine basis" (R. 569), *i.e.*, consideration upon the basis of exceptions to an examiner's decision. Due process of law does not require the Commission to read every page of the record before it regardless of its relevance, *Twin City Milk Producers Ass'n.* v. *McNutt*, 122 F. 2d 564, 569 (C.A. 8); the Commission may rely upon the briefs of the parties and staff to summarize the evidence and point up the issues.

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[10] Since natural gas is presently in great demand, some time limitation in the supply contracts was probably unavoidable, and the year limitation in the original contracts could hardly be regarded as unreasonable.

Morgan v. *United States*, 298 U.S. 468, 481.[11] It is well settled that the Commission's statement that it gave adequate consideration to a case must be accepted in the absence of concrete evidence of unfairness or injury. *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 696-697 (C.A. 9); *National Labor Relations Board* v. *Ford Motor Co.*, 118 F. 2d 766 (C.A. 9); *National Labor Relations Board* v. *Lane Cotton Mills Co.*, 108 F. 2d 568 (C.A. 5); *Inland Steel Co.* v. *National Labor Relations Board*, 105 F. 2d 246 (C.A. 7); *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 98 F. 2d 16 (C.A. 9). Petitioner does not offer such evidence. Unlike the *Morgan* case, *supra*, no facts are alleged here which, if proven, would establish that the required hearing was not given. At most, the difficulties of petitioner (and of the dissenting judge) with this aspect of the case are reduced to a disagreement as to how much time and effort the Commission must have needed to ponder the evidence and arguments and reach an intelligent decision. The important principle of the *Morgan* decision is that "the 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not

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[11] The dissenting judge (Pet. App. 15a-16a), took the position that the Commission was required to read every one of the over 20,000 record pages, regardless of their relevance to any issue before the Commission. But the briefs of the parties before the Commission had narrowed the issues, so that only a small portion of the record was pertinent to the Commission's decision. (No reference of any kind was made to over 16,700 pages of the record in the briefs of any party, including petitioner.) The Commission's opinion shows that it was thoroughly apprised of the record on the issues before it, and no practical purpose would have been served by its reading the thousands of pages of exhibits and testimony as to which there was no controversy. See *Cupples Company Manufacturers* v. *National Labor Relations Board*, 103 F. 2d 953, 957 (C.A. 8).

considered evidence or argument, it is manifest that the hearing has not been given." (298 U.S. at 480-481). No such situation is involved in the present case. The court below was satisfied that the Commission had considered the relevant materials and that this consideration was adequate to meet the requirements of a fair hearing (Pet. App. 8a-9a).

2. Petitioner argues (Pet. 23-33) that it should have been granted a hearing on whether the applicants subsequently complied with the certificate conditions; it also argues that the Commission should not have issued the certificates conditioned on the future filing of rate schedules.

The court below (Pet. App. 9a-10a) concluded, sustaining the Commission's finding to the same effect (R. 565-567), that petitioner had been heard as to all issues raised by the conditions, and that "no useful purpose would have been served by reopening the proceedings." We have pointed out, *supra*, pp. 5-8, that the applicants' willingness and ability to perform the proposed service was explored exhaustively in prolonged hearings on the applications; that petitioner was heard at length on every aspect of the proposed rate structure; and that the major conditions imposed by the Commission were in fact largely responsive to *petitioner's* objections and contentions.[12]

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[12] Petitioner's counsel and witnesses, as well as counsel for other interveners, in testimony and on cross-examination (1) attacked the allocation of costs between transportation and gas supply services proposed by the applicants, and urged that it should conform to the usual Commission practices (Tr. 7701-7702 *et seq.*); (2) attacked cancellation clauses in the proposed transportation contracts (Tr. 6774-6776, 7227-7229); (3) questioned the rate of return in Coastal's formula rate (Tr. 6492-6494), and (4) the financing proposals (Tr. 7445-7458); and (5) urged re-

Since its views on every controversial aspect of the proposed rate structure had already been presented to the Commission, petitioner, in fact, received the hearing required by Section 7 (c) of the Gas Act on the ultimate statutory findings of willingness and ability, and public convenience and necessity as embodied in the certificate and its conditions. Whether or not the applicants later complied with the rate conditions (which simply required the applicants to follow the usual Commission requirements and practices for pipe line rate structures), was ascertainable by a mechanical inspection of the schedules subsequently filed, tested by established rate techniques and principles.[13] Petitioner, having presented its case against all phases of the project, was not aggrieved by, and had no standing to be heard on, the question of formal compliance with the conditions, which raised no issues other than those on which a full hearing had already been held. *Arkansas Louisiana Gas Co.* v. *Federal Power Commission*, 113 F. 2d 281 (C.A. 5); see *Alston Coal Co.* v. *Federal Power Commission*, 137 F. 2d 740 (C.A. 10).

The Natural Gas Act provides in Section 19 (a) that

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duction in the working capital allowance in the cost of service formula for off-setting income tax accruals (Tr. 6549). Each of these matters was dealt with in the Commission's conditions (R. 462-465).

[13] The court below held (Pet. App. 9a-10a) that the conditions would not transform "the proposal into an entirely new proposition. • • • The conditions only resolved issues raised, argued and briefed in the hearing." Compliance with most of the conditions (*e.g.*, rate levels, omission of cancellation clauses, and financing provisions) obviously could be determined merely from visual inspection of the rate schedules. The Commission found that the cost allocation conditions had been met by arithmetical computation, the factual basis for which had been laid in the original hearings, in part by petitioner's own testimony (see *supra*, fn. 12).

"the Commission shall have power to grant or deny rehearing or to abrogate or modify its order *without further hearing*" (15 U.S.C. 717r (a), emphasis added), thus clearly contemplating that the Commission may rely on evidence presented at the original hearing, as it did in this case (R. 555-574).

Moreover, as the court below held (Pet. App. 5a), the fact that the Commission found the applicants able and willing to perform the service, and therefore issued a certificate of public convenience and necessity, before approving specific rate schedules, does not invalidate its order; there is no requirement in the Act that rate levels be fixed prior to certification. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. 2d 881 (C.A. D.C.), certiorari denied, 335 U.S. 854.[14]

Finally, there is no doubt that the Commission has the power under Section 7 (e) of the Act to impose reasonable conditions in certifying natural gas facilities. Petitioner does not argue that such power does not exist (Pet. 26, 28). And ever since the enactment of the statute, the Commission has frequently issued pipe line certificates conditioned on the filing of prescribed rates schedules without holding additional public hearings to inquire into the question of whether there has been subsequent compliance with the terms and conditions of a certificate as issued. There is nothing in the statute which requires that such a hearing be conducted. The only hearing contemplated in Section 7 (c) is the one preceding, and resulting in,

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[14] The petitioner in the *Panhandle* case, *supra*, argued that the Commission could not issue a pipe line certificate conditioned on subsequent filing of a satisfactory rate schedule. (See the petition in No. 251, O.T., 1948, pp. 3, 32-34).

the issuance or denial of a certificate. The statute goes on, in Section 7 (e), expressly to empower the Commission "to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." Obviously, all interveners have an opportunity to be heard on the question of what, if any, conditions should be attached. No provision is made for, or indicates that Congress intended, further hearings to determine compliance; this is a function which is committed to the Commission and which it is competent to perform. Virtually the same argument made here by petitioner against the granting of a certificate subject to a rate condition was rejected by the Court of Appeals for the Third Circuit in *Signal Oil and Gas Co.* v. *Federal Power Commission,* 238 F. 2d 771, certiorari denied, 353 U.S. 923. The fact that conditions may involve substantive changes in the project as originally proposed by the applicants lends no further weight to petitioner's argument. *Civil Aeronautics Board* v. *States Airlines, Inc.,* 338 U.S. 572; *Interstate Power Co.* v. *Federal Power Commission,* 236 F. 2d 372, 385 (C.A. 8), certiorari denied, 352 U.S. 967.[15]

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[15] The dissenting judge was principally concerned with the fact that, in its Opinion No. 301, the Commission found that "the evidence is not sufficient to enable a determination of precisely what the proper rate should be * * *." (Pet. App. 20a). But in the subsequent order of February 21, 1957, the Commission found that "on the basis of the record in this case and the filings submitted by Coastal and Houston Gas, we are able to conclude that the requirements of the basic conditions respecting the rate filings have been met, * * *." (R. 556). The Commission went on to find that the new rate schedules conformed to the usual cost-of-service formula (R. 557), for which principle petitioner had been contending throughout the hearing.

3. Petitioner also argues (Pet. 33-36) that the Commission was required not merely to consider but to make definite findings on the legality of the proposed project under the unfair trade or antitrust laws before granting or denying the certificates. The Commission gave extensive consideration to the possible effect of the project in lessening competition by injuring competing fuel interests (R. 430-431, 434-435, 444-445, 459-460, 568). The court below concluded in reviewing the evidence (Pet. App. 10a):

> While petitioner's business will no doubt be affected by the advent of natural gas, both petitioner and the pipeline companies can do business in Florida and both are needed to serve the growing population and expanding economy of Florida. The "injury" to petitioner is that it must share what has heretofore amounted to a power monopoly. Moreover, the injury to petitioner is not likely to be substantial. * * *

This Court has held, in comparable circumstances, that a regulatory agency's authority does not extend to enforcement of the Sherman and Clayton Acts and that it "cannot," as petitioner would have the Commission do, "decide definitively whether the [project] contemplated constitutes a restraint of trade or an attempt to monopolize * * *." *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79. Like the Interstate Commerce Commission, which was the agency involved in the *McLean* case, the Power Commission must consider "the effect of the [project] on competitors and on the general competitive situation in the industry * * *." (*Id.* at 87). But this Court's definition of the weight to be given to the antitrust laws in the course of an agency's administration of the statute and poli-

cies committed to it is apposite here (321 U.S. at 79-80):

> * * * Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus, here, the Commission has no power to enforce the Sherman Act as such. * * * The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.

The Power Commission, after weighing the possible impact of the project on competitors and the economy, concluded that the project should be certified because of the "overbalancing public benefits resulting from the authorizations" (R. 568). Further than this, the Commission need not go in carrying out its statutory responsibilities. See *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741 (C.A. D.C.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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